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ABSTRACT

This digest presents a brief review of recent Fourth Amendment decisions that affect the rights of students and the parameters of schools' authority to maintain a crime-free environment. Although Federal decisions apply nationwide and do mark the boundaries of permissible state and local action, state and local laws and regulations must always be considered in discussions of student rights. Over several decades, court cases have suggested that the balance between students' rights and school safety procedures is tilting towards the rights of school authorities to isolate and reduce perceived causes of school violence. Case law on searches of students, for example, supports school searches of students and their property when the search is reasonable in its inception and in its scope. In the area of drug testing, the U.S. Supreme Court has also supported educators' efforts to maintain perceived school order and discipline. With respect to students' rights in school, the current direction of Fourth Amendment law reflects society's fear of and disrespect for children and the lack of alternatives to police-type action that are used in the schools. Reliance on educational and preventive policies, as defined in the United Nations Convention on the Rights of the Child, will help protect the rights of students. (Contains 32 references.) (SLD)

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-Dorianne Beyer

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DIGEST

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SCHOOL SAFETY AND THE LEGAL RIGHTS OF STUDENTS

In ensuring school safety, the courts have sought to balance students' constitutional rights with the need for safety and freedom from violence in the schools. At present, the balance is thoroughly tilted towards efforts to effect tough safety and drug policies in the schools and against any extension of the current scant constitutional rights students enjoy. As the preoccupation with drugs and gang paraphernalia in the schoolhouse has escalated, school searches of students and seizures of their property in accord with the Fourth Amendment comprise a cutting edge issue for the courts and school authorities.

This digest presents a brief review of recent Fourth Amendment decisions that affect the rights of students and the parameters of schools' authority to maintain a crime-free environment. It is important to state, however, that education is almost exclusively a matter of state and local laws, regulations, and policies. It rarely involves the Federal government or Federal powers, except for the Federal courts' interpretations of constitutional protections in the school setting. Thus, although the Federal decisions illustrated below apply nationwide, and do serve to mark the boundaries of permissible state and local action, they are no substitute for an understanding of the many legal issues that are primarily a function of state and local laws. State and local school authorities must check the laws, regulations, legal precedents, and policies of their own jurisdiction to ascertain the lawful limits of their own actions, rather than rely upon the examples cited here.

General Fourth Amendment Issues

Over several decades, in a series of cases involving public school students, the U.S. Supreme Court and state courts have very gingerly both bestowed and limited Fourth Amendment rights. These cases suggest that the delicate balance between students, rights and school safety procedures is strongly tilting towards the rights of school authorities to proactively isolate and reduce perceived causes of school violence. Starting in 1968 and culminating in 1984, the law of the land concerning the status of students vis-à-vis school authorities shifted to a more constitutional basis. Prior to that time, student-school rights were defined by the common law doctrine of *in loco parentis*, which for centuries posited that school officials had the right, duty, and responsibility to act in the place of a parent. Their right to act included the exercise of many parental powers, such as the right to search students for illegal items, or for those items merely considered as contraband under state or local law or school district policies, without the warrant or probable cause mandated for all other citizens under the Fourth Amendment.

The doctrine of *in loco parentis* began crumbling in 1968, when *Tinker v. Des Moines Independent School District* (1969) found for the first time that constitutional rights—in this case, the First Amendment right to wear a black armband in school as symbolic speech in protest against the Vietnam War—were applicable to students. In landmark language that has been repeatedly cited, if not always upheld, the court said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (pp. 506, 511).

Tinker left unanswered the question of whether Fourth Amendment protections against unreasonable searches and seizures applied to students when searched by school authorities, and if so, with what restrictions, if any. It was not resolved until 1985, in *New Jersey v. T.L.O.* (1985). In that case, an assistant vice principal opened and searched the purse of T.L.O. (as the student involved was identified to protect her identity), after she had been accused of violating the school's policy of smoking a cigarette on high school property. His search disclosed not only a pack of cigarettes but also rolling papers associated with marijuana use, marijuana, a pipe, plastic bags, a large sum of money, a list of students who owed T.L.O. money, and two letters that involved her in dealing marijuana. When she was arrested on drug charges, she claimed that the evidence found in her purse should be suppressed as the fruits of an unreasonable search and seizure.

The court decided in *T.L.O.* that students subjected to school searches are, in fact, citizens covered by the Fourth Amendment. Also, for the first time, the court considered school officials, when acting in furtherance of publicly mandated educational and disciplinary policies, far more akin to government agents—the very subject of Fourth Amendment restrictions—than to parental surrogates

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who, under the doctrine of *in loco parentis*, were free from constitutional restraints.

The final question considered by the court was whether the search was reasonable, as guaranteed by the Fourth Amendment. The Amendment requires a warrant and probable cause before a search is considered reasonable, although there are several exceptions to the imposition of that formulaic and high standard. The *T.L.O.* court carved out another such exception to the usual standard; it found that the Fourth Amendment's requirement of reasonableness was met if school authorities acted without a warrant, but with "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction" (p. 733). Thus the "reasonable suspicion" standard was definitively asserted. It permitted school authorities to lawfully search students upon meeting its two-pronged test: the search must be (1) reasonable in inception, and (2) reasonable in scope.

Some recent search cases in which the two-pronged "reasonableness test" was successfully applied include these:

- A school dance monitor, who, upon seeing that some students were inebriated, in contravention of school policy, took them to a private office and asked them to blow on her face (*Martinez v. School District No. 60*, 1992).
- Upon hearing an unusual thud when a student threw his bag onto a metal cabinet, a security guard rubbed his hand along the bag to feel for a gun (*Matter of Gregory M.*, 1992/1993).
- Upon a student's report to a guidance counselor that another student possessed an illicit drug, the administrator searched the latter student's book bag, because the administrator also had knowledge that the student had been previously disciplined for possession of a controlled substance (*State v. Moore*, 1992).

The case law on student search and seizure has yielded a few other useful factors to consider when conducting a search to ensure that it is reasonable at the inception and in scope. They include the student's age, history, and school record; the seriousness and pervasiveness as a school problem of the suspected infraction or crime; the urgency that required the search without delay; the school official's prior experience with the student; and the evidentiary value and reliability of the information used to justify the search (Rapp, 1994).

What cannot and will not be condoned by the courts are searches that are performed with malicious intent to deprive students of their rights, those where school officials know or should have known that their actions violated students' rights, those that are capricious or discriminatory, and those that do not closely follow school search policies.

The *T.L.O.* rule and its progeny have been applied to the rights of school authorities to engage in the following acts:

- Search students' school lockers to look for contraband or illegal materials (*Student searches and the law*, 1995; *S.C. v. State*, 1991).
- Search a student's car in the school parking lot (*State v. Slattery*, 1990; *Student searches and the law*, 1995).
- Organize searches by drug-sniffing dogs (*Doe v. Renfrow*, 1980; *Horton v. Goose Creek Independent School District*, 1982; *Jennings v. Joshua Independent School District*, 1989; *Jones v. Latexo Independent School District*, 1980) or metal detector machines (*People v. Dukes*, 1992; *National Treasury Employers Union v. Van Raab*, 1989).
- Perform a visual or manual body cavity search (*Student searches and the law*, 1995).

Drug Testing Law

As contentious as Fourth Amendment issues have been, the lessons of the *T.L.O.* case were not substantially reviewed until the courts assessed the issue of mandatory and voluntary drug testing. Until 1995, the short answer to the question of whether schools could mandate all or a class of students to submit to blood or urine tests for drugs could be clearly answered: "no" (Price, 1988). Such testing was seen as a violation of students' reasonable expectation of privacy (*Jones v. McKenzie*, 1986), and repugnant not only to the U.S. Constitution, but also to the nation's common sense of students' integrity (*Anable v. Ford*, 1985; *Odenheim v. Carlstadt-East Rutherford Regional School District*, 1985). The courts did, however, make a distinction between mandatory and voluntary drug testing, with the latter subject to no Fourth Amendment protections, as it is based upon consent.

That distinction blurs, though, when the tests are used as a precondition for school enrollment or for participation in extracurricular activities. Until June 27, 1995, the courts were split on drug testing as a precondition for participating in extracurricular activities, with some courts approving it exactly because these activities are voluntary (*Student Searches and the Law*, 1995). Then came *Acton v. Vernonia School District 47J* (1991), which involved a high school student, James Acton, who wanted to be on his school's football team. His parents refused to sign a form consenting to a urinalysis that would test their son for a variety of drugs, if James were randomly selected by school authorities to comply with the school's newly instituted mandatory, random drug testing program. There was no claim that James was suspected of drug use, but school authorities asserted that their random urinalysis drug testing policy was the result of their being at their "wits' end" over how to solve a perceived growing drug problem (Daniels, 1995). James Acton, as a consequence of his parents' refusal to consent to such a test, was denied a

spot on the football team. In courtroom after courtroom, ending at the U.S. Supreme Court, school officials pressed their claim that they were justified in implementing their random testing program in order to stop the rowdy, anti-authoritarian behavior of their athletic teams that resulted from increased drug use in their rural Oregon school. The 9th Circuit Court of Appeals agreed with the Actons, found the mandatory policy an "unreasonable search," and rousingly stated that "children, students, do not have to surrender their right to privacy in order to secure their right to participate in athletics."

The U.S. Supreme Court did not agree, and once again tipped the scale in favor of educators' efforts to maintain perceived school order and discipline and against the preservation of an individual student's rights to privacy as guaranteed by the Fourth Amendment (*Vernonia School District 47J v. Action*, 1995). In this final appeal of the Vernonia case, the Court, in a 6-3 ruling, reversed the lower courts and found that the district's policy conformed with the Fourth and Fourteenth Amendments. It ruled that although the urine test was a "search" it was a "reasonable" one because legitimate governmental interests outweighed any intrusion on a student's privacy rights. The Court found that athletes have an even further reduced expectation of privacy than other students, as they are more closely regulated in many areas, such as grades and medical condition, and they participate in communal undressing and showering, further obviating any claim of physical privacy. In addition, the Court found that the urine test procedure was negligibly intrusive, even though students had to divulge the prescription drugs they were taking at the time, since the process was akin to public restroom conditions and the test was being used only to determine illicit drug use rather than to identify any medical situation. In an outright reversal of any previous rationales, the Court emphasized that a random drug testing policy was better than suspicion-based testing because the latter would turn the process into a badge of shame and would also permit teachers to arbitrarily test "troublesome but not drug-likely students."

Case Law Trends

The citation of *Vernonia* has served as the precedent for several constitutional decisions on the Federal district court or circuit court of appeals levels during the few years since its issuance. *Stigile v. Clinton* (1996) found a strong governmental interest in permitting random drug testing of high school athletes, when such testing is "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children, entrusted to its care."

Thompson v. Carthage School District (1996) permitted the generalized search of all males in the sixth through twelfth grades in an Arkansas school district that required them to empty their pockets and to submit to a "pat-down" for weapons by school authorities. The *Thompson* court applied T.L.O.'s two-pronged "reasonable test" and then applied the lessons of *Vernonia*. It found that *Vernonia*—which established that random drug testing in the absence of individualized suspicion was "reasonable," and that even the significant privacy invasion of a urinalysis was justified by the important government interest, as students' "reasonable guardian and tutor" in reducing drug abuse by student athletes—could buttress the court's rationale in permitting the invasive "pat-down" and emptying of pockets.

In *Wallace by Wallace v. Batavia School District* (1995), the court cited *Vernonia* when it permitted as a reasonable seizure a teacher's grabbing a high school student's wrists and elbow and escorting her out of the classroom, after observing the student participate in a screaming match with another student and then threaten that student with physical violence. The finding of "reasonableness" was based upon *Vernonia's* dictum that the nature of students' "rights is what is appropriate for children in school."

Cheema v. Thompson (1995) extended the previously abandoned legal theory of schools' functioning *in loco parentis*. The court noted that *Vernonia* held that for many purposes "school authorities act *in loco parentis*" when it decided, on other grounds, that Sikh students in California cannot be forced to utterly abandon their possession of religiously mandated ceremonial knives or cease attending public elementary school. After Cheema, it could be posited that there are still legal grounds to argue that school authorities are endowed with parental rights when assuring students' safety and drug-free status, and that students' constitutional protections are subservient to those parental rights.

Conclusion

With respect to students' rights in school, the current direction of Fourth Amendment law reflects society's fears of and disrespect for children and the paucity of alternatives to police-type enforcement measures that are both in use and under consideration in the schools. It also indicates that school authorities no longer have to grant students the civil rights considered inalienable by the rest of the nation's citizens. Thus, the first line of defense of school administrators is to bring in more policing measures, such as car searches, metal detectors, urinalyses, and drug-sniffing dogs. The cases reported here, as well as many others not discussed, result from the shared frustration felt by administrators trying to stop the perceived violence and drugs without restraint and alternative.

There is, however, a wealth of information and experience about alternatives to such draconian school violence prevention strategies. Law-related education (LRE) is a fresh approach to reducing the causes of school violence early and continually throughout a student's education. It is a generic, interdisciplinary direction in education that combines particular kinds of content (related to rules,

laws, and legal systems) with interactive instruction (McBee, 1995).

Student conflict resolution and mediation training, including student courts, represent another approach. Peer counseling has also proven effective in breaking the impasse between violent students and the school system (Sachnoff, 1988). Using trained students as helpers, friends, counselors, mediators, and educators to ease the school tensions and conflicts that result in violence is an educational and effective first line of defense against school disruptions and crime. The use of dress codes and uniforms to change a school's violent culture has also dramatically reduced crime and violence in many school districts ("Restricting Gang Clothing," 1994; Kennedy, 1995; "Long Beach Schools," 1995; "Regulating Student Appearance," 1994). Parental and other adult participation not only bolsters school anti-violence programs, but also aerates the school system and demonstrates the entire community's concern with students' education and progress. All of these initiatives provide early and ongoing education and experience in nonviolent means of violence prevention for grades K-12. In fact, the list of such innovative strategies to combat school violence is as extensive as society's creativity and commitment to empower rather than punish children.

Reliance on prevention programs is not only an issue of efficacy and morality, but is also one of international law. Children have human rights, regardless of their behavior or the school setting. The Convention on the Rights of the Child sets the basic, minimum standards for juvenile justice procedures, children's access to education, their rights to bodily integrity and mental health, and the provision of other resources to enable children to become healthy and productive adult citizens. One of the main tenets of the Convention is that children's human rights rest on a bedrock of their right to be heard, to be listened to, and to participate in the decisions and environments that affect their lives. Certainly, violence prevention training, as opposed to criminal enforcement techniques, is the course most consistent with a recognition of children's human rights. At this date, the Convention has been ratified by over 180 nations worldwide; only the United States, Somalia, and the Cooke Islands have not ratified it.

—Dorianne Beyer, Esq., General Counsel, National Child Labor Committee

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